

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Sbarro Franchise Co., LLC, et al.,)	Case No. 2:20-cv-00267-SDM-EPD
)	
Plaintiffs,)	Judge Sarah D. Morrison
)	
-vs-)	Magistrate Elizabeth Preston Deavers
)	
Pizza Partners Operations, LLC, et al.,)	PLAINTIFFS' MOTION
)	<u>FOR DEFAULT JUDGMENT</u>
Defendants.)	
)	Peter R. Silverman (SBN 0001589)
)	Michael A. Snyder (SBN 0069425)
)	Marcus A. Miller (SBN 0096597)
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)	<i>Attorneys for Plaintiffs</i>

* * *

Pursuant to Fed. R. Civ. P. 55, Plaintiffs, Sbarro Franchise Co., LLC, Sbarro, LLC, and Sbarro America, Inc. (collectively, "Sbarro Group"), move for a Default Judgment against Defendants, Pizza Partners Operations, LLC, Ft. Myers Pizza Partners, LLC, Port Charlotte Pizza Partners, LLC, Tampa Pizza Partners, LLC, Pensacola Pizza Partners, LLC, and Joseph Candito (collectively, "Defendants"), for failing to move, plead or otherwise respond to the Sbarro Group's Complaint For Damages and Declaratory Relief ("Complaint") within the time provided for by Fed. R. Civ. P. 12(a)(1). Upon

information and belief, no Defendant is a minor or an incompetent person and has not made known a claim of any rights under the Servicemembers Civil Relief Act, 50 U.S.C. §533. (See Declaration of Peter R. Silverman, ¶¶ 2-5, attached as Exhibit A.)

Defendants' failure to respond to the Complaint constitutes an admission to each and every averment contained in the Complaint. Accordingly, Defendants have admitted to the validity and breaches of the Franchise Agreements, Subleases, and the guarantee, as described in the Complaint. The Sbarro Group, therefore, respectfully request the Clerk or this Court to enter a judgment for:

- Sbarro Franchise Co., LLC against Defendants, jointly and severally, in the amount of \$68,632.90;
- Sbarro America, Inc. against Defendant Port Charlotte Pizza Partners, LLC for \$62,816.34;
- Sbarro, LLC against Defendant Ft. Myers Pizza Partners, LLC for \$51,679.35;
- Sbarro, LLC against Tampa Pizza Partners, LLC for \$66,060.02; and
- A declaration that the Subleases are terminated, and that Defendants, Ft. Myers Pizza Partners, LLC, Port Charlotte Pizza Partners, LLC, and Tampa Pizza Partners, LLC, have relinquished all interest in the Restaurants, the Restaurant premises, and the Leases (as those terms are defined in the Complaint), to Sbarro Franchise Co., LLC and Sbarro, LLC.

As explained in the Memorandum in Support, the above damages are a clearly ascertainable, liquidated amount. (See *generally* Affidavit of Mark Inzetta, attached as Exhibit B.)

Dated: June 17, 2020

Respectfully submitted

/s/ Peter R. Silverman

Peter R. Silverman (SBN 0001589)

Michael A. Snyder (SBN 0069425)

Marcus A. Miller (SBN 0096597)

SHUMAKER, LOOP & KENDRICK, LLP

Attorneys for Plaintiffs

MEMORANDUM IN SUPPORT

Plaintiffs, Sbarro Franchise Co., LLC (“Sbarro Franchise”), Sbarro, LLC, and Sbarro America, Inc. (“Sbarro America”) (collectively, “Sbarro Group”), move this Court for Default Judgment against Defendants, Pizza Partners Operations, LLC (“Pizza Partners”), Ft. Myers Pizza Partners, LLC (“Ft. Myers PP”), Port Charlotte Pizza Partners, LLC (“Port Charlotte PP”), Tampa Pizza Partners, LLC (“Tampa PP”), Pensacola Pizza Partners, LLC (“Pensacola PP”) and Joseph Candito (“Candito”) (collectively, “Defendants”), for failing to move, plead or otherwise respond to Sbarro Group’s Complaint For Damages and Declaratory Relief (“Complaint”) within the time provided for by Civil Rule 12(a)(1).

The Sbarro Group commenced this action on January 17, 2020. The Sbarro Group attempted service on each Defendant by certified mail. Summons was returned unexecuted as to Pizza Partners on April 6, 2020 [ECF No. 12], and on April 7, 2020 summons was returned unexecuted as to the remaining Defendants, Candito, Ft. Myers PP, Pensacola PP, Port Charlotte PP, and Tampa PP [ECF No. 13]. On April 8, 2020, the Clerk filed a Certificate of Mailing indicating that a summons and copy of the Complaint were sent by ordinary mail service to all Defendants. [ECF No. 14.] Thus, service on Defendants was complete on April 8, 2020, and Defendants’ responsive pleadings were due on April 29, 2020. [ECF No. 19.]

Defendants failed to move, plead, or otherwise respond to the Sbarro Group’s Complaint. The Sbarro Group filed its Amended Application for Entry of Default [ECF No. 24] on June 12, 2020. The clerk filed an Entry of Default as to all Defendants on June 15, 2020. [ECF No. 25.] Defendants, therefore, are in default under Civil Rule 12(a).

Fed. R. Civ. P. 8(b)(6) provides that each averment contained in the Complaint

has been admitted by Defendants' failure to move, plead, or otherwise respond to the Summons and Complaint. By reason of their defaults, Defendants have admitted to the validity and breach of the Franchise Agreement, Subleases, and guarantee, as described in the Complaint. Accordingly, judgment by default is warranted under Civil Rule 55(b).

As the Complaint and Affidavit of Mark Inzetta (attached as Exhibit B) demonstrates, the amount of the Sbarro Group's damages is clearly ascertainable and is liquidated in the total amount of \$249,188.61. (*See generally* Affidavit of Mark Inzetta ("Inzetta Aff.")). This amount includes \$68,632.90 of unpaid Continuing Royalties under the Franchise Agreements, which all Defendants are liable for. (Inzetta Aff., ¶¶ 6–9.) The damages amount also includes 180,555.71 in unpaid Base Rent and Additional Rent under the Subleases, broken down as follows: Port Charlotte PP is liable to Sbarro America for \$62,816.34 of unpaid Base Rent and Additional Rent; Ft. Myers PP is liable to Sbarro, LLC for \$51,679.35 of unpaid Base Rent and Additional Rent; and Tampa PP is liable to Sbarro, LLC for \$66,060.02 in unpaid Base Rent and Additional Rent. (Inzetta Aff., ¶¶ 10–15.)

Because the Sbarro Group's damages are clearly ascertainable and liquidated, no hearing on damages is required before granting judgment in the liquidated amount. *Brinager v. JAO Distributors, Inc.*, No. 1:14-CV-252, 2014 WL 3689147, at *1 (S.D. Ohio July 23, 2014)

Based upon the foregoing, Plaintiffs respectfully request default judgment as follows:

- For Sbarro Franchise Co., LLC against Defendants, jointly and severally, in the amount of \$68,632.90 for Continuing Royalties;
- For Sbarro America, Inc. against Defendant Port Charlotte Pizza Partners, LLC for \$62,816.34 for unpaid Base Rent and Additional Rent;

- For Sbarro, LLC against Defendant Ft. Myers Pizza Partners, LLC for \$51,679.35 for unpaid Base Rent and Additional Rent;
- For Sbarro, LLC against Tampa Pizza Partners, LLC for \$66,060.02 for unpaid Base Rent and Additional Rent; and
- A declaration that the Subleases are terminated, and that Defendants, Ft. Myers Pizza Partners, LLC, Port Charlotte Pizza Partners, LLC, and Tampa Pizza Partners, LLC, have relinquished all interest in the Restaurants, the Restaurant premises, and the Leases (as those terms are defined in the Complaint), to Sbarro Franchise Co., LLC and Sbarro, LLC.

Dated: June 17, 2020

Respectfully submitted

/s/ Peter R. Silverman

Peter R. Silverman (SBN 0001589)

Michael A. Snyder (SBN 0069425)

Marcus A. Miller (SBN 0096597)

SHUMAKER, LOOP & KENDRICK, LLP

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on June 17, 2020, I served a copy of the foregoing by U.S. mail on the following:

Joseph Candito
2550 10th Street
Naples, Florida 34103

Tampa Pizza Partners, LLC
2626 Tamiami Trail E
Naples, Florida 34112

Pensacola Pizza Partners, LLC
2626 Tamiami Trail E
Naples, Florida 34112

Pizza Partners Operations, LLC
2626 Tamiami Trail E
Naples, Florida 34112

Ft. Myers Pizza Partners, LLC
2626 Tamiami Trail E
Naples, Florida 34112

Port Charlotte Pizza Partners, LLC
2626 Tamiami Trail E
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/s/ Peter R. Silverman

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SHUMAKER, LOOP & KENDRICK, LLP

Attorneys for Plaintiffs